AZIZAH ZAINAL ABIDIN & ORS *a*

v.

DATO BANDAR KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR *b*
JAMES FOONG J
[SUIT NO: S5-21-34-1997]
11 FEBRUARY 1999

LOCAL GOVERNMENT: *Repairs - Maintenance of river - Street, Drainage and Building Act 1974, s. 53(1) - Whether "water-courses" include those which are man-made only - Whether local authority also has jurisdiction to manage and maintain natural water-courses* *c*

LOCAL GOVERNMENT: *Repairs - Notice - What amounts to good service of notice to landowners of decision to carry out repair works - Street, Drainage and Building Act 1974, s. 53(1)* *d*

TORT: *Trespass to land - Local authority carrying out repair works on river - Notice of works sent to landowner - Who is a trespasser - Whether local authority has jurisdiction to manage and maintain river - Whether entry into land unlawful - Trespasser ab initio - Whether local authority abused authority subsequent to entering land lawfully - Whether local authority became trespasser ab initio - Street, Drainage and Building Act 1974, s. 53(1)* *e*

LAND LAW: *Acquisition of land - Local authority carrying out repair works on river - Whether this amounts to use of property - Whether there was any compulsory acquisition of land - Whether landowner ought to be awarded compensation - Whether provision authorising local authority to maintain and manage natural water-courses violates art. 13(2) Federal Constitution* *f*

The plaintiffs were registered owners of a piece of land along which a river ran. The defendant, being the local authority over the land, appointed *g* contractors to undertake repair works on the river primarily to prevent flooding along the river. This necessitated the widening of the river and as a result, the river expanded thereby eating into a portion of the plaintiffs' land. No damages or compensation was paid to the plaintiffs for the loss of land and thus they instituted this action claiming damages principally on trespass. In *h* the alternative, the plaintiffs asserted that s. 54(1) of the Street, Drainage and Building Act 1974 ('the Act') relied on by the defendant to carry out the said works was ineffective and inapplicable because it contravened art. 13(2) of

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the Federal Constitution which provides that "No law shall provide for compulsory acquisition or use of property without adequate compensation." The defendant, on the other hand, denied trespass and contended that by virtue of s. 54(1) of the Act, it had a statutory right to carry out such works.

In support of their case based on trespass, the plaintiffs submitted a few arguments. Firstly, they contended that the defendant's authority does not extend to carrying out works on things which are natural such as rivers or streams. The thrust of this contention of the plaintiffs was this. Since s. 53(1) of the Act provides that the local authority can maintain "…surface and storm water drains, culverts, gutters, and water-courses…", applying the *ejusdem generis* rule of interpretation, the items expressed in the provision must genetically denote structures that are artificial or man-made rather than things which are natural.

Secondly, the plaintiffs alleged that no reasonable notice in writing of the works was forwarded to them contrary to the proviso to s. 53(1) of the Act. Against this, however, there was evidence that notice was sent by pre-paid post addressed to the owner. The notice was sent to an address obtained from the department in charge of collecting quit rent of the land. There also was evidence that a caretaker appointed by the plaintiffs, PW1, resided at the address the notice was sent to and that he had attended all meetings held prior to the works where explanations about the job to be done by the defendant were given. Additionally, there was a notation of the first plaintiff's name and a telephone number on a copy of the notice kept by the defendant. This notation, according to one of the defendant's witnesses, was made by her pursuant to a telephone call she received from the first plaintiff. Although the first plaintiff denied making such a call, it was revealed that the telephone number noted was of the first plaintiff's parents who were having charge of the management of the land.

Thirdly, the plaintiffs submitted that even if the works fell within the scope of s. 53(1) of the Act and reasonable notice was given, the defendant was still a trespasser because although the defendant's entry upon the land was lawful, his subsequent abuse of authority makes him a trespasser *ab initio*. According to the plaintiffs, the defendant had abused his authority by (a) failing to manage and organise the works reasonably; (b) failing to avoid damage of properties in the course of the work; and (c) having exceeded the original programme of works.

The proviso to s. 53(1) of the Act also requires the local authority to "…do as little damage as may be and shall make full compensation for any damage done." It was in evidence that two coconut trees were removed together with some turf which grew along the embankment. The defendant insisted that the

plaintiffs were fully compensated for the said damage and in support, a receipt for RM400 signed by PW1 was submitted. However, PW1 testified that the said RM400 was paid not as compensation but as rental for using a space on the land to store equipment and machinery.

Held:

[1] A trespasser is one who wrongfully enters on land in the possession of another and has neither right nor permission to be on the land. Here, the defendant did not enter the land unlawfully. Its workers carried out the works on the land lawfully and legally by virtue of s. 53(1) of the Act.

[2] The *ejusdem generis* approach can be departed if there is something to show that a wider sense to the general word was intended. The situation here is a case in point where the exception to the *ejusdem generis* rule applies. Parliament must have intended a wider meaning to the word "water-courses" to include water-courses created naturally.

[2a] The descriptive items listed in s. 53(1) of the Act relate to devices meant for the transportation of water from one place to another, whether the water comes from the household tap or a natural spring or river.

[2b] The flow of water passes through both natural and man-made water-courses and in many instances they are inter-connected at intervals. To adopt a restrictive view on the interpretation of the word "water-courses" will not only be inapplicable but also create havoc in the management and maintenance of the water system under the jurisdiction of any local authority.

[2c] "Water-courses" under s. 53(1) of the Act must include those which are natural as well as man-made. Thus, the defendant had jurisdiction to manage and maintain the river in question under s. 53(1) of the Act.

[3] By s. 120(1)(c) and (2) of the Act, service of notice is deemed good when the notice is forwarded "by post in a pre-paid cover addressed to such person at his usual or last known place of abode or business" and served on the owner or occupier of any premises "if addressed by the description of the 'owner' or 'occupier' of such premises without further name or description."

[3a] The fact that PW1 resided at the address stated and that he had attended the said meetings implied that (a) the notice was probably received as there was someone residing on the land where it was sent; (b) PW1,

being the agent of the plaintiffs and having received the letter, would impute knowledge of its contents to the plaintiffs; and (c) PW1 attended the meetings upon knowledge he received from the notice.

[3b] The nature of the notation on the copy of the notice kept by the defendant corresponding to the personalities involved with the land further convinced the court that the notice was duly sent and acknowledged by the plaintiffs, their agent and/or their servant.

[4] Apart from the mere contentions of the plaintiffs, there is practically no evidence adduced to show that the defendant was guilty of abuse of authority subsequent to lawfully entering the land. Only two coconut trees were removed together with some turf which grew around the embankment of the river and even these, the defendant insisted, were fully compensated as required by s. 53(1) of the Act. Thus, the allegation of the defendant becoming a trespasser *ab initio* was not made out.

[5] Each day sufficient material were delivered to the site and these were installed on the same day. Further, as the works were never static but progressed along the river each day, the defendant's contractors' machinery followed to the new location thus not requiring storage at any one place. As such, there was no necessity to rent from the plaintiffs any space on the land. Therefore, the RM400 was paid to PW1 for compensation of the fallen coconut trees and for turf that was removed. This RM400 paid to PW1 as servant and/or agent of the plaintiffs was more than adequate compensation.

[6] There was no compulsory acquisition or use of the land. The works carried out by the defendant was for maintenance and upkeep of the water-course and not for making new ones. If it was the latter, then s. 50(1) of the Act would apply and compulsory acquisition may be requested for by the defendant. Here no compulsory acquisition was ever sought for or enforced and thus no part of the plaintiffs' land was ever acquired by the defendant. As for "use of property", the defendant only carried out repairs and maintenance works and this could not be taken as "use of property". Thus, s. 53(1) of the Act has not violated art. 13 of the Federal Constitution.

[Claim dismissed.]

Cases referred to:
Public Prosecutor v. Pengurus Hong Trading & Co [1985] 1 MLJ 366 ***(aff)***
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan [1994] 4 CLJ 757 ***(aff)***

Legislation referred to:
Federal Constitution, art. 13(2)
Street, Drainage And Building Act 1974, ss. 50(1), 120(1)(c), (2), 53(1), 54(1)

Other source referred to:
Winfield & Jolowicz on Tort, 13th edn, p 369

For the plaintiffs - Azahar (Suzilawati with him), M/s Wan Marican, Hamzah & Shaik
For the defendant - Thangaraj Balasundram; M/s Thangaraj & Assoc

Reported by S Dharmendran

JUDGMENT

James Foong J:

The first six plaintiffs are the registered owners of undivided shares in a piece of land held under G.M.488 for Lot 514 in the Mukim of Setapak, Negeri Wilayah Persekutuan (the land). There is a river, commonly known as Sungai Belongkong (the river) running, substantially along and to a greater part inside the boundary of the land.

The defendant is a corporation created by statute under the Federal Capital Act 1971, and is the local authority over the land.

Sometime in June 1996, the Jabatan Saliran Pengurusan Sungai (JSPS) of the defendant, through its appointed contractors, undertook works (the works) to channelise the river. This was by placing L-shape concrete slabs closely together along the embankments. By this exercise the following will be achieved:

(i) soil erosion will be prevented and minimised;

(ii) water in the river will flow smoothly along a more definite and defined course;

(iii) the depth of the river will be increased to accommodate greater volume of water during heavy and/or frequent down pour;

(iv) the silt deposited in the river from upstream will be easily removed.

The upshot of all these is primarily to alleviate floods along the river.

There is no denial from the plaintiffs, as well as the residents along this stretch of the river where the works was undertaken, that this project, once completed by the defendant, has brought enormous benefits to them. But what they are quarrelling about is that they are not compensated for areas of their land

utilised for the project. In the case of the plaintiffs, the original area occupied by the river in the land was 7,565 square feet. When the works was completed, it expanded to 9,823 square feet. This obviously is due to the widening of the river. For the loss of 2,258 square feet, no damages or compensation was paid to them by the defendant.

The Plaintiffs' Claim

Dissatisfied, the plaintiffs in their statement of claim, from what I make out, are claiming damages based principally on trespass. In the alternative, they are also asserting that the provision of the law (s. 54(1) of the Streets, Drainage And Building Act 1974 (the Act) relied on by the defendant to carry out the works contravened art. 13(2) of the Federal Constitution, rendering it ineffective and inapplicable.

The Defendant's Defence

The defendant denies trespass and relies on its statutory right under s. 54(1) of the Act to carry out such works; and even if there were any damage costs during the works, it was duly compensated.

The Issue Of Trespass

To determine the first issue of trespass, it is necessary from the outset to define who a trespasser is. For this, I am greatly assisted by Justice Abdul Malik Ishak's judgment in *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan* [1994] 4 CLJ 757; [1994] 3 MLJ 530 where he restated this aspect of the law as follows:

> Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v. Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or if known, is practically objected to.

But as contended by the defendant: it did not enter the land unlawfully. Its workers carried out the works on the land lawfully and legally by virtue of s. 53(1) of the Act. This section reads as follows:

> Local authority to repair and alter and may discontinue surface and storm water drains, etc.
>
> The local authority shall maintain and keep in repair and, as it sees fit, enlarge, alter, arch over or otherwise improve all or any of the surface and storm water

drains, culverts, gutters, and water-courses under the control of the local authority and may discontinue, close up or destroy such of them, as it deems useless or unnecessary:

Provided that the local authority shall before entering any private property for the purpose of carrying out any work under this sub-section, give reasonable notice in writing in that behalf, and shall in carrying out such works do as little damage as may be and shall make full compensation for any damage done.

The immediate response to this from the plaintiffs is that the river does not fit the description of any of the items listed under s. 53(1) of the Act. There is no specific mention of river or stream in this provision of the law. And by the *ejusdem generis* rule of interpretation, all these items – "surface and storm water drains, culverts, gutters, and water-courses" expressed in s. 53(1) of the Act must genetically denote structures that are artificial or man-made, rather than things which are natural, such as a stream or a river, of which Sungai Belongkong is one.

After reviewing the fairly substantial evidence on the origin and history of the river, I conclude that Sungai Belongkong is a copious natural stream of water flowing in a channel which ultimately discharges into the sea. It is a tributary to the more renowned Sungai Gombak which passes through the heart of Kuala Lumpur. It did, before the works, flowed through a natural water course and not in man-made structures. In such nature, the next question is whether it falls within any of the descriptions specified under s. 53(1) of the Act.

Undoubtedly except for "water-courses" all preceding items to this described in s. 53(1) of the Act imply artificial man-made configurations. If adopting the *ejusdem generis* rule of interpretation of statute, where particular words are followed by general words the general words are limited to the same kind as the particular words, then "water-courses" may be interpreted to associate with those made by man as distinguished from those created naturally. But this approach can be departed if "there is something to show that a wider sense (to the general word) was intended" – see Eusoff Chin J (as he then was) in *Public Prosecutor v. Pengurus Hong Trading & Co* [1985] 1 MLJ 366. I am of the view that the situation before me is a case in point where this exception to the *ejusdem generis* rule applies, and that Parliament in its wisdom, when enacting this piece of legislation (the Act) must have intended a wider meaning to the word "water-courses" to include that water-courses created naturally. When one examines the descriptions of all the descriptive items listed in s. 53(1) of the Act they relate to devices meant for the transportation of water from one place to another; whether the water comes from the household tap

or a natural spring or river. But are these devices within any local authority area strictly confined to only man-made materials? I am afraid not. The flow of water passes through both natural and man-made water-courses, and in many instances they are inter-connected at intervals. To adopt a restrictive view on the interpretation of the word "water-courses" will not only be inapplicable but also create havoc in the management and maintenance of the water system under the jurisdiction of any local authority. Imagine water flowing through a natural stream connected on one end by a concrete water drain and the other by a structured gutter. If erosion occurs in the stream, clogging up the water flow, the local authority, in-charge of management and maintenance of the water system of the area is not authorised to repair this particular section while it is permissible to do so at both ends. This makes no logical sense and I am certain, the legislature never intended this. "Water-courses" under this provision of the law must include those which are natural as well as man-made. In the case of Sungai Belongkong which is a natural water-course, the defendant has jurisdiction to manage and maintain it under s. 53(1) of the Act.

Though having decided that the defendant has a legal right to enter upon the land for the purpose as specified in s. 53(1) of the Act, the proviso thereto requires prior notice of entry into the land must be given to the plaintiffs, and in carrying out the works the defendant must "do as little damage as may be and shall make full compensation for any damage done." Towards these the plaintiffs took issues.

The first is the allegation that no reasonable notice in writing of the works was forwarded to the plaintiffs. Considerable amount of evidence was advanced by both parties to prove and disprove this. However, after due consideration I am not convinced by this plaintiffs' claim. The following are my reasons:

Firstly, the defendant has produced a copy of a notice dated 12 April 1996, informing, in a comprehensive manner, not only the works then proposed to be carried out, but also the relevant provision of the law enacted for the purpose. The addressee of this notice is "Pemilik Lot 514, Kg. Sungai Mulia, Jalan Gombak, 53000 Kuala Lumpur." According to the defendant's witness, this address was obtained from the department in charge of collecting quit rent of the land. There was no denial from the plaintiffs that this was not their postal address. Their only claim was that this notice was not received. But how could this be when it was properly sent by pre-paid post, and when the entire procedure of posting this letter from the stage when it was signed right to the point when it was recorded as being sent out was explained in evidence by the defendant? Further, in accordance with s. 120(1)(c) and (2) of the Act, such service is deemed good when it was: forwarded "by post in a pre-paid cover addressed to such person at his usual or last known place of abode or

business", and served on the owner or occupier of any premises "if addressed by the description of the 'owner' or 'occupier' of such premises without further name or description."

Secondly, there is the evidence from the plaintiffs that their appointed caretaker, PW1, resided at the address stated in the notice. And he (PW1) had attended all meetings held prior to the works where explanations and elaborations of the job to be done by the defendant were given. This implies three things: (a) the notice was probably received as there was someone residing on the land where it was sent; (b) PW1, being the agent of the plaintiffs, having received the letter would imply knowledge of its contents to the plaintiffs; (c) PW1 attended the meetings upon knowledge he received from the notice.

Thirdly, there is a record in writing on a copy of this notice kept by the defendant, of the name of the 1st plaintiff and a telephone number. According to defence witness, DW2, this recording was done by her pursuant to a telephone call she received from the 1st plaintiff. Though the 1st plaintiff denied this assertion, there is an admission that the telephone number written by DW2 on the copy of this notice was of her parents who were having charge of the management of the land. With such a recording corresponding to the personalities involved with the land, I am further convinced that this notice was duly sent and acknowledged by the plaintiffs, their agent and/or their servant.

Refusing to concede, the plaintiffs submitted that even if the works fall within the scope of s. 53(1) of the Act, and reasonable notice was given in accordance with the proviso thereto, the defendant was still a trespasser by committing *'trespass ab initio'*. To explain this Latin phrase, Encik Azahar quoted a text from *Winfield & Jolowicz on Tort*, 13th edn, at p. 369 which states:

> When an entry upon land or other *prima facie* trespass is justified by authority of the law itself, than, according to an ancient doctrine of the common law, if the actor abuses his authority he becomes a trespasser *ab initio*; his act is reckoned as unlawful from the very beginning, however innocent his conduct may have been up to the moment of the abuse. The doctrine applies only if the authority is that of the law, not that of other party concerned, and the abuse must be by positive act, not a mere omission.

But what abuse did the defendant commit? Though it is pleaded in the plaintiffs' statement of claim that the defendant had failed to: (a) manage and organise the works reasonably from time to time as promised to the residence of the area around the land; (b) avoid damage of properties in the course of the work; and (c) had exceeded their original programme of works, there is practically no evidence adduced to support these contentions. This court was

informed by PW1 that only two coconut trees on the land were removed together with some turf which grew around the embankment of the river. But these, the defendant insisted, were fully compensated, as required by s. 53(1) of the Act. Without substantiating evidence to support this plaintiffs' claim, I am afraid the allegation of the defendant being a trespasser *ab initio* finds no favour in this court.

On the subject of compensation for damage caused while the works proceeded, there is a challenge by the plaintiffs that they were never paid by the defendant for such. But this is untrue. When PW1, the servant and/or agent of the plaintiffs, was cross-examined on whether he received any compensation from the defendant or its contractors, he replied categorically in the negative. However, when subsequently encountered with a receipt which he had signed for RM400 from the defendant's contractor, he attempted to explain that this was payment for rental of a space on the land to store the defendant's contractor's equipment and machinery. To me, this explanation was an afterthought to ward off an exposure to his incredible claim. I tend to accept what was testified by the defendant's contractor involved in paying this compensation to PW1. According to him, there was no necessity to rent from the plaintiffs any space on the land for storage. Each day a sufficient number of L-shape concrete slabs were delivered to the site from their yard. These were then installed on the same day. As the works were never static but progressed along the river each day their machinery followed to the new location – not requiring storage at any one particular place. This sum of RM400 was paid to PW1 for compensation of the fallen coconut trees and for turf that was removed.

Having decided on the above, the next question is whether this sum of RM400 is sufficient, for s. 53(1) of the Act requires the defendant to "pay full compensation for any damage done." To do so, obviously one begins by investigating what damage was done.

From evidence, it was only the coconut trees and the turf. Though there were some disputes as to the number of fallen coconut trees, but even accepting the higher number of 5, and together with the removed turfs, I think RM400, so paid to PW1 as servant and/or agent of the plaintiffs, is more than adequate and sufficient.

Article 13 Of The Federal Constitution

The second claim of the plaintiffs, which is in the alternative, pivots on art. 13(2) of the Federal Constitution which promulgates that:

(2) No law shall provide for compulsory acquisition or use of property without adequate compensation.

According to the plaintiffs, s. 53(1) of the Act relied on by the defendant to carry out the works, contravenes this article of the Federal Constitution by depriving them of part of the land and providing no adequate compensation; accordingly this provision of the law is ineffective and inapplicable.

To analyse this, I must determine whether there was compulsory acquisition or use of the land. In full agreement with the defendant's counsel, I find none. The works carried out by the defendant was for maintenance and upkeep of the water-course; not by making new ones. If it was the latter, then s. 50(1) of the Act would apply, where compulsory acquisition may be requested for by the defendant. But in this case, no compulsory acquisition was ever sought for or enforced; thus no part of the plaintiffs' land was ever acquired by the defendant. As for: "use of the property", I cannot consider that the defendant's deed falls within this definition. As reiterated, the defendant only carried out repairs and maintenance works thereon. This cannot be taken as "use of the property." By these reasons, I find that s. 53(1) of the Act has not violated art. 13 of the Federal Constitution.

Conclusion

Based on the aforesaid, I accordingly dismiss the plaintiffs' claim with costs.